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No. 91-1410

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1991

SAMUEL E. WALLER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

1. We take exception to the government's claim that "there is no conflict" between the Court of Appeals' decision below and the First Circuit opinion in United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990). See Gov't Opp. 4-5. The district court and the

Court of Appeals in this case specifically held that the district judge was not required to recuse himself because the alleged source of bias, the Wirth Memorandum, was not extra-judicial.[1] The district court stated: "The information was not extra-judicial, but was knowledge obtained in the course of my earlier participation in what must be considered the same case. This does not require recusal." C.A. Excerpts of Record 111. The Court of Appeals held that "information obtained by a judge through judicial duties in relation to one co-defendant, however, cannot serve

[1] The government erroneously characterizes the Wirth Memorandum as an FBI report. The memorandum was written by an IRS Special Agent after Mr. McKinney was convicted. It was written specifically for Mr. McKinney's probation officer for inclusion in McKinney's presentence report.

to disqualify that judge from the subsequent trial of another co-defendant." Pet. App. A-4. The First Circuit in Chantal, on the other hand, expressly considered and rejected the Ninth Circuit's adherence to the extra-judicial source requirement. 902 F.2d at 1021-1022. The Chantal court stated: "The First Circuit, however, has repeatedly subscribed to what all commentators characterize as the correct view that. . .the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." 902 F.2d at 1022.

Petitioner relied on Chantal in the Court of Appeals. The Ninth Circuit expressly refused to follow Chantal. "Waller relies on a First Circuit opinion [Chantal] to support his

contention that an impermissible appearance of judicial bias can originate even when a judge is performing judicial duties. We have not followed the First Circuit's position on this issue." Pet. App. 4-5. We fail to see why the government cannot concede the obvious existence of a conflict among the circuits on this important question when the circuits themselves have acknowledged that the conflict exists.

2. The parties and the courts are all in agreement that the question of recusal under 28 U.S.C. § 455(a) is governed by an objective, reasonable-person standard. See Gov't Opp. 6 n.4. The problem is that after paying lip service to the objective standard embodied in § 455(a), the government, as

well as the district court and Court of Appeals, has claimed that recusal was not required in this case on subjective grounds, such as the district court's claim that he had forgotten the significance and the allegations contained in the Wirth Memorandum, and that he was not in fact biased against Petitioner as a result of the Memorandum. See Gov't Opp. 4; Pet. App. A-5; C.A. Excerpts of Records 114 ("I conclude that I was impartial because I know that I was not affected by the inadmissible and irrelevant speculation contained in the memorandum.")

However, as to objective bias, the record completely rebuts the government's groundless claim that "the district judge's impartiality could not reasonably be questioned. . . ." Gov't

Opp. 6. In fact, the district court itself acknowledged that the appearance of partiality was created by his receipt of the Wirth Memorandum. See Transcript of Motions Hearings, November 5, 1990, at 39 (". . .but I do believe that the appearance of the question exists, and I think it is aggravated here by the fact I allowed a waiver of the jury.") There can be no dispute but that a potential juror who had received and reviewed the extremely prejudicial allegations contained in the Wirth Memorandum would have been immediately disqualified from serving as a juror at Petitioner's trial.[2] The appearance of bias and

[2] Special Agent Wirth's Memorandum alleged that most of the currency deposited by Mr. McKinney and Petitioner was derived from international drug smuggling activities of other individuals, Hartog, Southard, and

partiality, conceded by the district court to exist, was greatly magnified by virtue of the fact that the district court acted as the jury in this bench trial. Petitioner acknowledges that a trial judge is presumed to disregard inadmissible evidence in deciding a case. Gov't Opp. 4. That does not change the fact that a reasonable person would question the impartiality of a judge who received prejudicial information unbeknownst to a litigant,

Levine. "[I]t is very evident that [] McKinney and Waller have been closely associated with Daniel Den Hartog, Jack Southard, and possibly Edward Levine, among others, since at least December 1985. It is also evident that these associates of McKinney and Waller have been deriving substantial profits, consisting of massive quantities of U. S. currency, from the illegal importation and distribution of Thai marijuana over at least the past four or five years, and possibly much longer." Wirth Memorandum at 13.

failed to inform the litigant of it, and then presided over the litigant's bench trial.

3. Petitioner does not dispute the government's claim that the Ninth Circuit and other circuits continue to look to an extra-judicial source of bias in determining whether recusal is required under § 455(a). See Gov't Opp. 5 n.2. Continued adherence of the Ninth Circuit and other circuits to the extra-judicial source requirement is contrary to legislative intent. In 1974 Congress amended § 455, enacting the current objective standard governing recusal. This replaced the old subjective standard in which a court had a duty to sit and was only required to recuse itself if "in his opinion" the judge deemed it improper to sit in a

particular case. See Chantal, 902 F.2d at 1022-1024. The extra-judicial source requirement is a relic of the outdated subjective standard. The Ninth Circuit and other circuits relied on by the government inexplicably continue to blindly adhere to this requirement even in the face of the clearly expressed legislative intent underpinning § 455(a) and the objective standard that it embodies. This is the reason for the conflict with Chantal.

4. The government claims that Petitioner knew the details of the government's drug theory because of Mr. McKinney's sentencing and should have moved for recusal at the outset of Petitioner's trial. Gov't Opp. 6 n.5. That is wrong. Presentence reports are confidential. Petitioner did not have

access to Mr. McKinney's Presentence Report (and the Wirth Memorandum attached to it) at the time of McKinney's sentencing. Petitioner did not obtain the McKinney Presentence Report until after his own bench trial and prior to his own sentencing when he filed a motion for disclosure of McKinney's Presentence Report. The evidence proffered by the government at the trial of McKinney and Petitioner as to drug source was not nearly so prejudicial as the undisclosed allegations contained in the Wirth Memorandum. See Pet. C.A. Br. 24-26.

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CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

DATED this 4/13 day of May, 1992.

Respectfully submitted,

NORMAN SEPENUK, P.C.

S/

Norman Sepenuk
Douglas Stringer
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

James L. Sutherland
Assistant U. S. Attorney
701 High Street
Eugene, Oregon 97401-2713

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 14 day of May, 1992.

S/
Norman Sepenuk
Of Attorneys for Petitioner